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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LISA MARIE HICKEY,)	Civil No. 07cv0228-BEN (BLM)
)	
Petitioner,)	
)	REPORT AND RECOMMENDATION FOR
v.)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS
DAWN S. DAVISON, Warden,)	
)	
Respondent.)	
_____)	

This Report and Recommendation is submitted to United States District Judge Roger T. Benitez pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California.

On November 13, 2006¹, Petitioner Lisa Marie Hickey, a state prisoner appearing *pro se*, commenced these habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Doc. No. 1. Petitioner challenges her conviction for manufacturing methamphetamine. Id.

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¹ Petitioner originally filed her Petition in the Central District of California. That court transferred the case to this District on February 2, 2007. Doc. No. 1 (finding Southern District to be the more convenient forum).

DEA Agent Andrew Jauch arrested Hickey. After her arrest, Hickey admitted to Agent Jauch that the materials found in the storage unit belonged to her. Hickey told Agent Jauch that she had purchased most of the items from a man named Terry H.. (sic) Hickey also told Agent Jauch that she intended to sell or trade the items to a second person named Fred B., who was looking to purchase items to use in the manufacture of methamphetamine. Hickey also admitted to Agent Jauch that she had "washed some dope"² for Fred B.

In March 2005, the People charged Hickey in an amended information with manufacturing methamphetamine (§ 11379.6, subd. (a), count 1), possessing pseudoephedrine with the intent to manufacture methamphetamine (§ 11383, subd. (c)(1), count 2), and possessing a firearm as a felon (Pen. Code, § 12021, subd. (a)(1), count 3). As to counts 1 and 2, the People alleged that Hickey had previously been convicted of manufacturing methamphetamine (§ 11370.2, subd. (b)). In addition, the People alleged that Hickey had suffered four prior felony convictions (Pen. Code, § 1203, subd. (e)(4)) and two prison prior convictions (Pen. Code, §§ 667.5, subd. (b), 668).

In March 2005, in the first phase of a bifurcated trial, a jury found Hickey guilty of the charged offenses. In the second phase of the trial, Hickey admitted the prior conviction allegations. The trial court sentenced Hickey to a total prison term of 10 years eight months.

Lodgment 5.

B. Direct Appeal

Petitioner appealed to the California Court of Appeal, Fourth Appellate District, Division One. Lodgment 2. In an unpublished opinion filed on April 20, 2006, the California Court of Appeal affirmed the conviction. Lodgment 1. Petitioner then filed a petition for review in the California Supreme Court (Lodgment 6), which was summarily denied without citation of authority on July 19,

² Agent Jauch defined the phrase, "washing dope," as follows: "at a point in manufacturing methamphetamine, near the end ... it sometimes has a dirty appearance, and manufacturers like to wash it with a solvent like acetone in order to give it a shinier, clearer, cleaner appearance."

1 2006 (Lodgment 7).

2 **C. Collateral Review**

3 Petitioner did not seek collateral review of her conviction
4 in the state courts.

5 On November 13, 2006, Petitioner filed the instant Petition
6 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. No. 1.
7 Respondent timely filed an Answer on April 4, 2007. Doc. No. 7.
8 Petitioner did not file a traverse by the May 9, 2007 deadline or
9 timely request additional time to do so and the Court took the
10 matter under submission.

11 **STANDARD OF REVIEW**

12 Title 28 of the United States Code, section 2254(a), sets
13 forth the following scope of review for federal habeas corpus
14 claims:

15 The Supreme Court, a Justice thereof,
16 a circuit judge, or a district court shall
17 entertain an application for a writ of
18 habeas corpus in behalf of a person in
19 custody pursuant to the judgment of a State
20 court only on the ground that he is in
21 custody in violation of the Constitution or
22 laws or treaties of the United States.

23 28 U.S.C. § 2254(a).

24 The Petition was filed after enactment of the Anti-terrorism
25 and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-
26 132, 110 Stat. 1214. Under 28 U.S.C. § 2254(d), as amended by
27 AEDPA:

28 (d) An application for a writ of habeas
corpus on behalf of a person in custody
pursuant to the judgment of a State court
shall not be granted with respect to any
claim that was adjudicated on the merits in
State court proceedings unless the
adjudication of the claim—

1 (1) resulted in a decision that was
 2 contrary to, or involved an unreasonable
 3 application of, clearly established Federal
 law, as determined by the Supreme Court of
 the United States; or

4 (2) resulted in a decision that was
 5 based on an unreasonable determination of
 6 the facts in light of the evidence
 presented in the State court proceeding.

7 28 U.S.C. § 2254(d). Summary denials do constitute adjudications on
 8 the merits. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002).
 9 Where there is no reasoned decision from the state's highest court,
 10 the Court "looks through" to the underlying appellate court
 11 decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991).

12 A state court's decision is "contrary to" clearly established
 13 federal law if the state court: (1) "arrives at a conclusion
 14 opposite to that reached" by the Supreme Court on a question of law;
 15 or (2) "confronts facts that are materially indistinguishable from
 16 a relevant Supreme Court precedent and arrives at a result opposite
 17 to [the Supreme Court's]." Williams v. Taylor, 529 U.S. 362, 405
 18 (2000).

19 A state court's decision is an "unreasonable application" of
 20 clearly established federal law where the state court "identifies
 21 the correct governing legal principle from this Court's decisions
 22 but unreasonably applies that principle to the facts of the
 23 prisoner's case." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003).
 24 "[A] federal habeas court may not issue a writ simply because the
 25 court concludes in its independent judgment that the relevant state-
 26 court decision applied clearly established federal law erroneously
 27 or incorrectly Rather, that application must be *objectively*
 28 unreasonable." Andrade, 538 U.S. at 75-76 (emphasis added)

1 (internal quotation marks and citations omitted). Clearly
2 established federal law "refers to the holdings, as opposed to the
3 dicta, of [the United States Supreme] Court's decisions." Williams,
4 529 U.S. at 412.

5 Finally, habeas relief is also available if the state court's
6 adjudication of a claim "resulted in a decision that was based on an
7 unreasonable determination of the facts in light of the evidence
8 presented in state court." 28 U.S.C. § 2254(d)(2). A state court's
9 decision will not be overturned on factual grounds unless this Court
10 finds that the state court's factual determinations were objectively
11 unreasonable in light of the evidence presented in the state court
12 proceeding. See Miller-El, 537 U.S. at 340. This Court will
13 presume that the state court's factual findings are correct, and
14 Petitioner may overcome that presumption only by clear and
15 convincing evidence. 28 U.S.C. § 2254(e)(1).

16 DISCUSSION

17 Petitioner presents two grounds for habeas relief. In ground
18 one, Petitioner contends that the trial court violated her federal
19 due process rights by incorrectly instructing the jury on the
20 elements of manufacturing methamphetamine. Pet. at 5. In ground
21 two, Petitioner argues that the trial court violated her federal due
22 process rights by failing to give *sua sponte* a lesser-included
23 offense instruction. Id. More precisely, Petitioner contends that
24 California Health and Safety Code § 11379.6(c), which prohibits
25 *offering* to manufacture methamphetamine, is a lesser-included
26 offense of manufacturing methamphetamine (§ 11379.6(a)). Id.

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Respondent counters that the Petition should be denied because the claims are questions of state law, which this Court cannot address on federal habeas review. Resp't Mem. P. & A. Supp. Answer ("Resp't Mem.") at 8-16. Alternatively, Respondent argues that Petitioner has failed to demonstrate that the state court's decision rejecting her claims on the merits was objectively unreasonable. Id. (citing 28 U.S.C. § 2254(d)). Respondent does not dispute that Petitioner raised her claims for relief in a petition for review before the California Supreme Court and that these claims, therefore, are exhausted. See Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996) (citing Anderson v. Harless, 459 U.S. 4, 6 (1982) and Picard v. Connor, 404 U.S. 270, 275 (1971)) (for exhaustion purposes, Petitioner must have "fairly presented" her federal claim to the highest state court with jurisdiction to consider it).

A. Jury Instruction Regarding Manufacturing Methamphetamine

Petitioner contends that the trial court violated her due process rights by incorrectly instructing the jury on the elements of manufacturing methamphetamine under § 11379.6(a). Pet. at 5. Specifically, Petitioner argued in the state courts³ that §11379.6(a) should not "be interpreted to encompass the initial and intermediate steps in the manufacturing process, but only the actual act of manufacturing." Lodgment 2 at 12; Lodgment 6 at 31. In instructing the jury, the trial court utilized California Jury

³ In her federal habeas petition, Petitioner asserted two very short, vague and conclusory grounds for relief. Pet. at 5. Because Petitioner did not provide any support or explanation for the alleged due process violations, this Court looked to her state court pleadings for elucidation on her claims and allegations.

1 Instruction - Criminal 12.09.1, as follows:

2 Every person who manufactures or offers to
3 manufacture methamphetamine, a controlled substance,
4 either directly or indirectly by chemical extraction
or independently by means of chemical synthesis is
guilty of a violation of Health and Safety Code
11379.6, subdivision (a), a crime.

5
6 The crime of manufacturing a controlled substance
and the term "manufacture" as used in this
7 instruction, does not require proof or mean that the
process of manufacturing be completed. Rather, the
8 crime is committed when a person knowingly
participates in the initial or intermediate steps to
9 carry out (sic) to process a controlled substance.
Thus, it is unlawful for a person to engage in the
10 synthesis, processing, or preparation of a chemical
used in the manufacture of a controlled substance,
11 even if the chemical itself is not or is not (sic)
itself a controlled substance, provided the person
12 knows that the chemical is to be used in the
manufacturing of a controlled substance.

13 In order to prove this crime, each of the
14 following elements must be proved:

15 1. A person manufactured or offered to
16 manufacture either directly or indirectly, by means of
chemical extraction, or independently by means of
17 chemical synthesis, a controlled substance, namely
methamphetamine; and

18 2. That person knew that the substance to be
19 manufactured had the character of a controlled
substance.

20 Lodgment 8 at 460-61; see also Lodgment 1 at 50 (CALJIC 12.09.1).

21 In evaluating the merits of Petitioner's claim, this Court
22 must look through to the last reasoned state court decision. See
23 Ylst, 501 U.S. at 801-06. Here, because the California Supreme
24 Court summarily denied Petitioner's petition (Lodgment 7), the last
25 reasoned state court decision came from the California Court of
26 Appeal. Lodgment 5.

27 The Court of Appeal rejected Petitioner's claim on the
28 following grounds:

III.

DISCUSSION

A. *Section 11379.6, subdivision (a) prohibits participation in any stage of the process of manufacturing methamphetamine*

Hickey claims there is insufficient evidence that she manufactured methamphetamine pursuant to section 11379.6, subdivision (a) because that statute does not prohibit the initial or intermediate steps necessary to manufacture methamphetamine. "The interpretation of a statute's meaning is a question of law that is reviewed de novo." (*People v. Germany* (2005) 133 Cal.App.4th 784, 789.)

Section 11379.6 provides in relevant part:

"(a) Except as otherwise provided by law, every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 shall be punished by imprisonment in the state prison for three, five, or seven years and by a fine not exceeding fifty thousand dollars (\$50,000). (sic)

[¶]...[¶]

"(c) Except as otherwise provided by law, every person who offers to perform an act which is punishable under subdivision (a) shall be punished by imprisonment in the state prison for three, four, or five years."⁴

In *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813 (*Lancellotti*), the court held that section 11379.6, subdivision (a) criminalizes participation in the initial and intermediate stages of the methamphetamine manufacturing process. The defendant in *Lancellotti* stored chemicals used to manufacture methamphetamine at a commercial storage facility. (*Lancellotti, supra*, 19 Cal.App.4th at p. 812.) The storage unit also contained most of the equipment needed to manufacture methamphetamine. (*Ibid.*) On appeal from his conviction for manufacturing

⁴ Methamphetamine is one of the controlled substances identified in section 11055. (§ 11055, subd. (d)(2).)

methamphetamine (§ 11379.6, subd. (a)), the defendant claimed the evidence was insufficient to support his conviction because the storage unit lacked a certain piece of equipment and a reducing agent that were necessary to complete the methamphetamine manufacturing process. (*Lancellotti, supra*, 29 Cal.App.4th at p. 811.)

The *Lancellotti* court rejected this argument, stating:

"The evidence in this case clearly establishes that appellant was in the middle of the manufacturing process for methamphetamine, because '... the conduct proscribed by section 11379.6 encompasses the initial and intermediate steps carried out to manufacture, produce or process [a controlled substance].' [Citation.] (sic)

[¶]...[¶]

"The cumulative nature of the evidence in appellant's case, including the contents of the locker which all taken together are only used in manufacture of methamphetamine, the presence of chloropseudoephedrine, a substance which cannot be purchased and is used only in the manufacture of methamphetamine, and the odor emanating from the locker, provide substantial evidence that the manufacture of methamphetamine, an incremental and not instantaneous process, was in progress." (*Lancellotti, supra*, 19 Cal.App.4th at p. 813.)

In *People v. Coira* (1999) 21 Cal.4th 868 (*Coira*), the Supreme Court cited *Lancellotti* for the proposition that, "The conduct proscribed by ... section [11379.6, subd. (a)] encompasses the initial and intermediate steps carried out to process a controlled substance." (*Coira, supra*, 21 Cal.4th at p. 874.) The *Coira* court explained, "[T]he statute makes it unlawful to engage in the chemical synthesis of a substance as one part of the process of manufacturing a controlled substance." (*Ibid.*) Numerous other courts have reached the same conclusion. (See, e.g., *People v. Heath* (1998) 66 Cal.App.4th 697, 705 [section 11379.6, subdivision (a) "criminalize[s] all acts which are part of the [methamphetamine] manufacturing process"].)

...

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1 "conclude[d] that section 11379.6, subdivision (a) criminalizes
2 participation in any stage of the methamphetamine manufacturing
3 process" (Lodgment 5 at 8) and the Supreme Court affirmed the Court
4 of Appeal's decision (Lodgment 7). While Petitioner may not agree
5 with this conclusion, this Court does not have authority on habeas
6 review to evaluate a state court's interpretation of state law. See
7 Bradshaw v. Richey, 546 U.S. 74, ___, 126 S.Ct. 602, 604 (2005) ("We
8 have repeatedly held that a state court's interpretation of state
9 law, including one announced on direct appeal of the challenged
10 conviction, binds a federal court sitting in habeas corpus");
11 Estelle, 502 U.S. at 67-68; Lewis, 497 U.S. at 783.

12 Petitioner contends, however, that she has raised a federal
13 claim because the trial court's alleged failure to correctly
14 instruct the jury relieved the prosecution of its burden to prove
15 all of the elements of section 11379.6 and violated Petitioner's due
16 process rights. Pet. at 5. Federal habeas relief is warranted
17 where a petitioner establishes that the ailing instruction by itself
18 "so infected the entire trial that the resulting conviction violates
19 due process." Estelle, 502 U.S. at 71-72; see also Donnelly v.
20 DeChristoforo, 416 U.S. 637, 643 (1974) (explaining that the
21 challenged instruction cannot merely be "undesirable, erroneous, or
22 even 'universally condemned'" – it must violate some constitutional
23 right). The instruction may not be judged in artificial isolation,
24 rather, it must be considered in the context of both the
25 instructions as a whole and the trial record. See Estelle, 502 U.S.
26 at 72. When reviewing an allegedly ambiguous instruction, courts
27 are required to inquire "whether there is a reasonable likelihood
28 that the jury has applied the challenged instruction in a way" that

1 violates the Constitution. Boyde v. California, 494 U.S. 370, 380
 2 (1990); Calderon v. Coleman, 525 U.S. 141, 146 (1998) (same).

3 Estelle presupposes that the jury instruction was somehow
 4 faulty under state law. See Estelle, 502 U.S. at 71-72. In this
 5 case, the only challenge Petitioner raises to the validity of the
 6 jury instruction is that construing § 11379.6(a) as encompassing the
 7 preliminary and intermediate steps in the manufacturing process
 8 reads § 11379.6(c), which prohibits *offering* to manufacture
 9 methamphetamine, out of the statute. Lodgment 6 at 14. More
 10 precisely, Petitioner submits that an offer to manufacture
 11 methamphetamine necessarily constitutes a preliminary step in the
 12 manufacture of methamphetamine. Id. at 15.

13 The Court finds no support for Petitioner's argument. As
 14 Petitioner concedes, no California legal precedent supports this
 15 interpretation.⁵ Moreover, Petitioner's reading of § 11379.6 does
 16 not yield a logical conclusion. As the Court of Appeal pointed out,
 17 a person can manufacture a controlled substance, or undertake any
 18 step of the manufacturing process, without first offering to do so.
 19 See Lodgment 5 at 7. Thus, Petitioner has failed to satisfy the
 20 threshold requirement of demonstrating that the jury instruction was
 21 incorrect. Estelle, 502 U.S. at 72.

22 ⁵ Petitioner conceded in her opening brief before the Court of Appeal
 23 that:

24 ... under *People v. Lancelloti* (sic), *People v. Heath*, *People v.*
 25 *Stone*, and *People v. Jackson*, her conviction for manufacturing a
 26 controlled substance in violation of section 11379.6, subdivision
 27 (a), can be affirmed. Each of those cases interpreted section
 28 11379.6, subdivision (a), to encompass all initial and intermediate
 steps in the manufacturing process. *People v. Lancellotti* involved
 the discovery of equipment necessary to manufacture a controlled
 substance in a commercial storage unit, and is therefore most
 similar to the instant case.

Lodgment 2 at 11.

Apart from this challenge to the Court of Appeal's legal determination on a state law issue, Petitioner alleges no other factual or legal grounds to support her assertion that the methamphetamine manufacturing instruction violated her constitutional rights.⁶ See id. (quoting Donnelly, 416 U.S. at 643) (internal quotations omitted) ("[I]t must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some [constitutional right]"). Nor does Petitioner argue what specific, adverse impact the jury instruction had on the trial or the jury's determination in light of

⁶ Though Petitioner did not raise this argument before the state courts or in the instant petition, this Court notes that the CALJIC 12.09.1 instruction read to the jury by the trial judge instructed the jury that a person can be found guilty of manufacturing methamphetamine if the person "manufactures or offers to manufacture" methamphetamine. CALJIC 12.09.1; Lodgment 8 at 460 (emphasis added). In other words, the instruction, as given by the trial court, suggests that the jury could have found Petitioner guilty of manufacturing methamphetamine (§ 11379.6(a)) because they believed she offered to manufacture methamphetamine for someone (§ 11379.6(c)). This distinction is significant because § 11379.6(c) involves a lower sentencing range. When reviewing an allegedly ambiguous instruction, the court first must inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. Boyde, 494 U.S. at 380; Coleman, 525 U.S. at 146. Here, the government did not allege in the amended information that Petitioner offered to manufacture methamphetamine. Lodgment 1 at 5-6. Nor did it pursue this theory in its opening or closing statements to the jury. See Lodgment 8 at 87-96, 463-73. Moreover, the Court has reviewed the record as a whole and finds no evidence that Petitioner offered to manufacture methamphetamine for anyone. See Estelle, 502 U.S. at 72. While there is evidence that Petitioner offered to sell *equipment* to Bostic and that Terry H. asked Petitioner for money or methamphetamine, there is no evidence that Petitioner offered to manufacture methamphetamine for either individual. See Lodgment 8 at 159-62. Accordingly, this Court finds that it is not reasonably likely that the jury applied CALJIC 12.09.1 in an unconstitutional way by convicting Petitioner of § 11379.6(a) (manufacturing) based on evidence that supported a conviction under § 11379.6(c) (offering to manufacture).

1 the evidence presented. Having reviewed both the jury instructions
2 provided and the record as a whole, this Court finds no evidence
3 suggesting that the trial court's failure to provide *sua sponte* an
4 instruction that excluded the preliminary steps of manufacturing
5 methamphetamine affected the fundamental fairness of Petitioner's
6 trial or deprived Petitioner of her right to due process of law.
7 The Court also finds no basis in the record for concluding that
8 there is a reasonable likelihood that the jury applied the
9 challenged instruction in a way that violates the Constitution.
10 Estelle, 502 U.S. at 72; Boyde, 494 U.S. at 380.

11 Accordingly, this Court finds that the trial court's
12 instruction on § 11379.6 did not "so infect[] the entire trial that
13 the resulting conviction violates due process." Estelle, 502 U.S.
14 at 71-72. The Court, therefore, finds that the Court of Appeal's
15 decision upholding Petitioner's conviction for manufacturing
16 methamphetamine was not contrary to the clearly established federal
17 law set forth in Estelle, see Williams, 529 U.S. at 405, and
18 **RECOMMENDS** that Petitioner's Petition be **DENIED** on ground one.

19 **B. Failure to Provide A Lesser-Included Offense Instruction**

20 Petitioner contends that the trial court violated her due
21 process rights by not instructing the jury on the lesser-included
22 offense of offering to manufacture methamphetamine under
23 §11379.6(c). Pet. at 5. Respondent argues that Petitioner is not
24 entitled to federal habeas relief on this claim because the claim
25 does not present a federal question. Resp't Mem. at 12.
26 Alternatively, Respondent urges that the state court's decision was
27 not objectively unreasonable and that Petitioner has failed to show
28 that the claimed error had a substantial and injurious effect on the

1 jury's verdict. Id.

2 Because the California Supreme Court summarily denied
3 Petitioner's petition (Lodgment 7), the Court once again must "look
4 through" to the California Court of Appeal's opinion (Lodgment 5).
5 See Ylst, 501 U.S. at 801-06. Applying California law, the Court of
6 Appeal concluded:

7 Hickey has cited no authority to support her
8 assertion that offering to manufacture methamphetamine
9 is a lesser included offense of manufacturing
10 methamphetamine, and we are aware of no such
11 authority. As we stated in part III.A, *ante*, a person
12 can manufacture a substance without first offering to
do so. Therefore, the offense of manufacturing
methamphetamine may be completed without committing
the offense of offering to manufacture
methamphetamine.

13 We conclude that offering to manufacture
14 methamphetamine is not a lesser included offense of
15 manufacturing methamphetamine, and thus, that the
trial court did not err in failing to instruct the
jury sua sponte on the offense of offering to
manufacture methamphetamine.

16 Lodgment 5 at 10.

17 Respondent argues that this Court should defer to the state
18 court's determination that offering to manufacture methamphetamine
19 under § 11379.6(c) is not a lesser-included offense of manufacturing
20 methamphetamine under § 11379.6(a). Resp't Mem. at 14. As
21 previously noted, federal habeas corpus relief is not available to
22 correct alleged errors in a state court's application or
23 interpretation of state law. See Estelle, 502 U.S. at 67-68; Lewis,
24 497 U.S. at 783; see also 28 U.S.C. §§ 2254(a), (b)(2). However,
25 because Petitioner has alleged a federal due process violation and
26 because federal courts are obligated to construe *pro se* pleadings
27 liberally, see Barron v. Ashcroft, 358 F.3d 674, 676 (9th Cir.
28 2004), this Court finds that Petitioner has alleged a federal

1 violation sufficient to enable review of her claim.

2 Petitioner challenges the Court of Appeal's decision to
3 uphold her conviction despite the trial court's failure to instruct
4 on the lesser-included offense of offering to manufacture
5 methamphetamine. Pet. at 5. This Court may not grant habeas relief
6 unless the state court's adjudication on the merits "resulted in a
7 decision that was contrary to, or involved an unreasonable
8 application of, clearly established Federal law, as determined by
9 the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).
10 Here, as Respondent correctly points out, the United States Supreme
11 Court has not "clearly established" that defendants in noncapital
12 cases have a right to lesser-offense instructions. Resp't Mem. at
13 13. Although the Supreme Court in Beck v. Alabama, 447 U.S. 625,
14 637-38 (1980), held that the Due Process Clause entitles a defendant
15 to an instruction on a lesser-included offense in a capital case,
16 there is no "clearly established" Supreme Court law that requires
17 that the court give a lesser-included offense instruction in a
18 non-capital case. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir.
19 2000); see also Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir.
20 1984) (quoting James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976))
21 ("the failure of a state court to instruct on a lesser offense [in
22 a non-capital case] fails to present a federal constitutional
23 question and will not be considered in a federal habeas corpus
24 proceeding"). As such, this Court cannot say that the Court of
25 Appeal's decision was contrary to clearly established Supreme Court
26 law.

27 ///

28 ///

1 Even if Petitioner had a constitutionally-recognized right to
2 a lesser-included offense instruction, the Court of Appeal did not
3 err in finding that offering to manufacture methamphetamine is not
4 a lesser-included offense of manufacturing methamphetamine. "Under
5 California law, a lesser offense is necessarily included in a
6 greater offense if either the statutory elements of the greater
7 offense, or the facts actually alleged in the accusatory pleading,
8 include all the elements of the lesser offense, such that the
9 greater cannot be committed without also committing the lesser."
10 People v. Birks, 19 Cal. 4th 108, 117 (1998). As discussed in the
11 previous section, a defendant can commit the offense of
12 manufacturing methamphetamine without ever having *offered* to
13 manufacture methamphetamine. As such, contrary to Petitioner's
14 assertion, offering to manufacture methamphetamine is not a lesser-
15 included offense of the conviction offense.

16 For the foregoing reasons, this Court **RECOMMENDS** that
17 Petitioner's Petition be **DENIED** on ground two.

18 **CONCLUSION AND RECOMMENDATION**

19 In sum, this Court finds that Petitioner has failed to
20 present any evidence suggesting that the California Court of
21 Appeal's decision as to her claims was contrary to, or an
22 unreasonable application of, clearly established federal law. See
23 28 U.S.C. § 2254(d). Nor has Petitioner made any argument that
24 further factual development is necessary, such that an evidentiary
25 hearing would be warranted. See 28 U.S.C. § 2254(e)(2) (exceptions
26 where an evidentiary hearing may be appropriate). As such, this
27 Court **RECOMMENDS** that Petitioner's Petition for Writ of Habeas
28 Corpus be **DENIED** and the case dismissed with prejudice.

1 For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** that
2 the District Court issue an Order: (1) approving and adopting this
3 Report and Recommendation, and (2) directing that Judgment be
4 entered denying the Petition.

5 **IT IS HEREBY ORDERED** that any written objections to this
6 Report must be filed with the Court and served on all parties **no**
7 **later than July 13, 2007**. The document should be captioned
8 "Objections to Report and Recommendation."

9 **IT IS FURTHER ORDERED** that any reply to the objections shall
10 be filed with the Court and served on all parties **no later than**
11 **August 3, 2007**. The parties are advised that failure to file
12 objections within the specified time may waive the right to raise
13 those objections on appeal of the Court's order. See Turner v.
14 Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

15 **IT IS SO ORDERED.**

16 DATED: June 21, 2007

17 

18 BARBARA L. MAJOR
19 United States Magistrate Judge

20
21
22 COPY TO:

23 HONORABLE ROGER T. BENITEZ
24 UNITED STATES DISTRICT JUDGE

25 ALL COUNSEL AND PARTIES
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